

Criminal Law Symposium



Hearsay Evidence: Applying *Crawford v Washington*, 541 US 36 (2004), and Common Misunderstandings Regarding Hearsay Evidence

Reference

- ◆ *Crawford v Washington*, 541 US 36 (2004)
- ◆ Michigan Rules of Evidence



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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 02–9410

MICHAEL D. CRAWFORD, PETITIONER *v.*
WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WASHINGTON

[March 8, 2004]

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia’s tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner’s conviction after determining that Sylvia’s statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment’s guarantee that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which

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Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

"Q. Okay. Did you ever see anything in [Lee's] hands?

"A. I think so, but I'm not positive.

"Q. Okay, when you think so, what do you mean by that?

"A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

"Q. Did Kenny do anything to fight back from this assault?

"A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

"Q. After he was stabbed?

"A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

"Q. Okay, you, you gotta speak up.

"A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right

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pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

“Q. Okay, when he’s standing there with his open hands, you’re talking about Kenny, correct?”

“A. Yeah, after, after the fact, yes.”

“Q. Did you see anything in his hands at that point?”

“A. (pausing) um um (no).” *Id.*, at 137 (punctuation added).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse’s consent. See Wash. Rev. Code §5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse’s out-of-court statements admissible under a hearsay exception, see *State v. Burden*, 120 Wash. 2d 371, 377, 841 P. 2d 758, 761 (1992), so the State sought to introduce Sylvia’s tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee’s apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be “confronted with the witnesses against him.” Amdt. 6. According to our description of that right in *Ohio v. Roberts*, 448 U. S. 56 (1980), it does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate ‘indicia of reliability.’” *Id.*, at 66. To meet that test, evidence must either fall within a “firmly rooted hearsay exception” or bear

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“particularized guarantees of trustworthiness.” *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense or “justified reprisal”; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a “neutral” law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was “damning evidence” that “completely refutes [petitioner’s] claim of self-defense.” Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia’s statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State’s argument that Sylvia’s statement was reliable because it coincided with petitioner’s to such a degree that the two “interlocked.” The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner’s self-defense claim: “[Petitioner’s] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia’s version has Lee grabbing for something only after he has been stabbed.” App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia’s statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: “[W]hen a codefendant’s confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.” 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002)

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(quoting *State v. Rice*, 120 Wash. 2d 549, 570, 844 P. 2d 416, 427 (1993)). The court explained:

“Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. . . .

“[B]oth of the Crawfords’ statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

“[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia’s statement reliable.” 147 Wash. 2d, at 438–439, 54 P. 3d, at 664 (internal quotation marks omitted).¹

We granted certiorari to determine whether the State’s use of Sylvia’s statement violated the Confrontation Clause. 539 U. S. 914 (2003).

II

The Sixth Amendment’s Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall

¹The court rejected the State’s argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that “forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson’s choice.” 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals’ conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

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enjoy the right . . . to be confronted with the witnesses against him.” We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U. S. 400, 406 (1965). As noted above, *Roberts* says that an unavailable witness’s out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” 448 U. S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution’s text does not alone resolve this case. One could plausibly read “witnesses against” a defendant to mean those who actually testify at trial, *cf.* *Woodsides v. State*, 3 Miss. 655, 664–665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, *Evidence* §1397, p. 104 (2d ed. 1923) (hereinafter *Wigmore*), or something in-between, see *infra*, at 15–16. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one’s accusers is a concept that dates back to Roman times. See *Coy v. Iowa*, 487 U. S. 1012, 1015 (1988); Herrmann & Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int’l L. 481 (1994). The founding generation’s immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, *Commentaries on the Laws of England* 373–374 (1768).

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Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that “occasioned frequent demands by the prisoner to have his ‘accusers,’ *i.e.* the witnesses against him, brought before him face to face.” 1 J. Stephen, *History of the Criminal Law of England* 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, *History of English Law* 216–217, 228 (3d ed. 1944); *e.g.*, *Raleigh’s Case*, 2 How. St. Tr. 1, 15–16, 24 (1603); *Throckmorton’s Case*, 1 How. St. Tr. 869, 875–876 (1554); *cf.* *Lilburn’s Case*, 3 How. St. Tr. 1315, 1318–1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, *Prosecuting Crime in the Renaissance* 21–34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, *Pleas of the Crown* 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528–530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh’s alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh’s trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: “Cobham is absolutely in the King’s

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mercy; to excuse me cannot avail him; by accusing me he may hope for favour.” 1 D. Jardine, *Criminal Trials* 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face” 2 How. St. Tr., at 15–16. The judges refused, *id.*, at 24, and, despite Raleigh’s protestations that he was being tried “by the Spanish Inquisition,” *id.*, at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh’s trial judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused “face to face” at his arraignment. *E.g.*, 13 Car. 2, c. 1, §5 (1661); see 1 Hale, *supra*, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley’s Case*, 6 How. St. Tr. 769, 770–771 (H. L. 1666); 2 Hale, *supra*, at 284; 1 Stephen, *supra*, at 358. Several authorities also stated that a suspect’s confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, *Pleas of the Crown* c. 46, §3, pp. 603–604 (T. Leach 6th ed. 1787); 1 Hale, *supra*, at 585, n. (k); 1 G. Gilbert, *Evidence* 216 (C. Lofft ed. 1791); cf. *Tong’s Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King v. Westbeer*, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King’s Bench an-

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swered this question in the affirmative, in the widely reported misdemeanor libel case of *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where “the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination.” *Id.*, at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick’s counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick’s Case*, 13 How. St. Tr. 537, 591–592 (H. C. 1696) (Powys) (“[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined . . . ; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence . . .”); *id.*, at 592 (Shower) (“[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him [O]ur constitution is, that the person shall see his accuser”). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings—one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603–604 (Williamson); *id.*, at 604–605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore §1364, at 22–23, n. 54. Fenwick was condemned, but the proceedings “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination.” *Id.*, §1364, at 22; cf. *Carmell v. Texas*, 529 U. S. 513, 526–530 (2000).

Paine had settled the rule requiring a prior opportunity

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for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King v. Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (*dicta*); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only “by Force ‘of the Statute’”), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King v. Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791); *King v. Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789); cf. *King v. Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787); 3 Wigmore §1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484–492; T. Peake, Evidence 63–64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, §17, the change merely “introduced in terms” what was already afforded the defendant “by the equitable construction of the law.” *Queen v. Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).²

²There is some question whether the requirement of a prior opportu-

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B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having “privately issued several commissions to examine witnesses against particular men *ex parte*,” complaining that “the person accused is not admitted to be confronted with, or defend himself against his defamers.” A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, §57 (1765); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 396–397 (1959). Colonial representatives protested that the Act subverted their rights “by extending the jurisdiction of the courts of admiralty beyond its ancient limits.” Resolutions of the Stamp Act Congress §8th (Oct. 19, 1765), reprinted in *Sources of Our Liberties* 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, ar-

nity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore §1364, at 23 (requirement “never came to be conceded at all in England”); T. Peake, *Evidence* 64, n. (m) (3d ed. 1808) (not finding the point “expressly decided in any reported case”); *State v. Houser*, 26 Mo. 431, 436 (1858) (“there may be a few cases . . . but the authority of such cases is questioned, even in [England], by their ablest writers on common law”); *State v. Campbell*, 1 S. C. 124, 130 (1844) (point “has not . . . been plainly adjudged, even in the English cases”). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser*, *supra*, at 436; *Campbell*, *supra*, at 130; T. Cooley, *Constitutional Limitations* *318.

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gued: “Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them.” Draft of Argument in *Sewall v. Hancock* (1768–1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights §8 (1776); Pennsylvania Declaration of Rights §IX (1776); Delaware Declaration of Rights §14 (1776); Maryland Declaration of Rights §XIX (1776); North Carolina Declaration of Rights §VII (1776); Vermont Declaration of Rights Ch. I, §X (1777); Massachusetts Declaration of Rights §XII (1780); New Hampshire Bill of Rights §XV (1783), all reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: “The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.” 2 *Debates on the Federal Constitution* 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of “written evidence” while objecting to the omission of a vicinage right: “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom

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leads to the proper discovery of truth.” R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N. C. 103 (1794) (*per curiam*), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.” *Id.*, at 104.

Similarly, in *State v. Campbell*, 1 S. C. 124 (1844), South Carolina’s highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: “[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent.” *Id.*, at 125. The court said that one of the “indispensable conditions” implicitly guaranteed by the State Constitution was that “prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.” *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (1807) (*per curiam*). Most courts rejected that view, but only after reaffirming that admissibility de-

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pendent on a prior opportunity for cross-examination. See *United States v. Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *State v. Houser*, 26 Mo. 431, 435–436 (1858); *Kendrick v. State*, 29 Tenn. 479, 485–488 (1850); *Bostick v. State*, 22 Tenn. 344, 345–346 (1842); *Commonwealth v. Richards*, 35 Mass. 434, 437 (1837); *State v. Hill*, 2 Hill 607, 608–610 (S. C. 1835); *Johnston v. State*, 10 Tenn. 58, 59 (1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, *Criminal Procedure* §1093, p. 689 (2d ed. 1872); T. Cooley, *Constitutional Limitations* *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon “the law of Evidence for the time being.” 3 Wigmore §1397, at 101; accord, *Dutton v. Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most

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flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and

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concurring in judgment); “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham’s examination was unsworn, see 1 Jardine, *Criminal Trials*, at 430, yet Raleigh’s trial has long been thought a paradigmatic confrontation violation, see, e.g., *Campbell*, 1 S. C., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, *Pleas of the Crown*, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 8.³

³These sources—especially Raleigh’s trial—refute THE CHIEF JUSTICE’s assertion, *post*, at 3 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post*, at 2, n. 1, is belied by the very existence of a

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That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, *Criminal Law of England*, at 221; Langbein, *Prosecuting Crime in the Renaissance*, at 34–45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194–200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.⁴

B

The historical record also supports a second proposition:

general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what THE CHIEF JUSTICE calls use of a “proxy,” *post*, at 3—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

⁴We use the term “interrogation” in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U. S. 291, 300–301 (1980). Just as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation,” and we need not select among them in this case. Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

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that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right . . . to be confronted with the witnesses against him,” Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U. S. 237, 243 (1895); cf. *Houser*, 26 Mo., at 433–435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.⁵

⁵THE CHIEF JUSTICE claims that English law’s treatment of testimonial statements was inconsistent at the time of the framing, *post*, at 4–5, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law. See *supra*, at 10. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations—explicitly in *King v. Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789), and *King v. Dingle*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791), and by implication in *King v. Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787).

None of THE CHIEF JUSTICE’s citations proves otherwise. *King v. Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half-century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingle*. Hale’s treatise is older still, and far more ambiguous on this point, see 1 M. Hale, *Pleas of the Crown* 585–586 (1736); some who

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espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views. See *Fenwick's Case*, 13 How. St. Tr. 537, 602 (H. C. 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is *King v. Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790), but even that decision provides no substantial support. *Eriswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. *Id.*, at 707–708, 100 Eng. Rep., at 815–816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible. *Id.*, at 713–714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, *Evidence*, at 64, n. (m) ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, *Evidence* 487–488, n. (c) (1826) ("Buller, J. . . . refers to *Radbourne's* case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T. R., at 710, 100 Eng. Rep., at 817 (Grose, J.); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous. See *id.*, at 710, n. (c), 100 Eng. Rep., at 817, n. (c). Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King v. Ferry Frystone*, 2 East 54, 55, 102 Eng. Rep. 289 (K. B. 1801) ("The point . . . has been since considered to be so clear against the admissibility of the evidence . . . that it was abandoned by the counsel . . . without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes*. More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See *supra*, at 13–14; see also *supra*, at 11, n. 2 (coroner statements). The common-law rule

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We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that “[t]here were always exceptions to the general rule of exclusion” of hearsay evidence. *Post*, at 5. Several had become well established by 1791. See 3 Wigmore §1397, at 101; Brief for United States as *Amicus Curiae* 13, n. 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.⁶ Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly v. Virginia*, 527 U. S. 116, 134 (1999) (plurality opinion) (“[A]ccomplices’ confessions that inculcate a criminal defendant are not

had been settled since *Paine* in 1696. See *King v. Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K. B.).

⁶The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U. S. 237, 243–244 (1895); *King v. Reason*, 16 How. St. Tr. 1, 24–38 (K. B. 1722); 1 D. Jardine, *Criminal Trials* 435 (1832); Cooley, *Constitutional Limitations*, at *318; 1 G. Gilbert, *Evidence* 211 (C. Lofft ed. 1791); see also F. Heller, *The Sixth Amendment* 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock, supra*, at 501–504, 168 Eng. Rep., at 353–354; *Reason, supra*, at 24–38; Peake, *Evidence*, at 64; cf. *Radbourne, supra*, at 460–462, 168 Eng. Rep., at 332–333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

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within a firmly rooted exception to the hearsay rule”).⁷

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness’s prior trial testimony. *Mattox v. United States*, 156 U. S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: “The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of” *Id.*, at 244.

Our later cases conform to *Mattox*’s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs*, 408 U. S. 204, 213–216 (1972); *California v. Green*, 399 U. S. 149, 165–168 (1970); *Pointer v. Texas*, 380 U. S., at 406–408; cf. *Kirby v. United States*, 174 U. S. 47, 55–61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber v. Page*, 390 U. S. 719, 722–725 (1968); cf. *Motes v. United States*, 178 U. S. 458, 470–471 (1900). We similarly excluded accomplice confessions

⁷We cannot agree with THE CHIEF JUSTICE that the fact “[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions.” *Post*, at 6. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

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where the defendant had no opportunity to cross-examine. See *Roberts v. Russell*, 392 U. S. 293, 294–295 (1968) (*per curiam*); *Bruton v. United States*, 391 U. S. 123, 126–128 (1968); *Douglas v. Alabama*, 380 U. S. 415, 418–420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton v. Evans*, 400 U. S., at 87–89 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts*, 448 U. S., at 67–70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly v. Virginia*, *supra*, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily v. United States*, 483 U. S. 171, 181–184 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.⁸

⁸One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U. S. 346 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349–351. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U. S., at 348–349. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We “[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions.” *Id.*, at 351, n. 4.

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Lee v. Illinois, 476 U. S. 530 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State’s attempt to admit an accomplice confession. The State had argued that the confession was admissible because it “interlocked” with the defendant’s. We dealt with the argument by rejecting its premise, holding that “when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted.” *Id.*, at 545. Respondent argues that “[t]he logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant’s statement *may* be admitted.” Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception—previously unknown to this Court’s jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s *own* confession against him in a joint trial. See *Parker v. Randolph*, 442 U. S. 62, 69–76 (1979) (plurality opinion), abrogated by *Cruz v. New York*, 481 U. S. 186 (1987).

Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.⁹

⁹THE CHIEF JUSTICE complains that our prior decisions have “never drawn a distinction” like the one we now draw, citing in particular *Mattox v. United States*, 156 U. S. 237 (1895), *Kirby v. United States*, 174 U. S. 47 (1899), and *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). *Post*, at 4–6. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby*

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V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” 448 U. S., at 66. This test departs from the historical principles identified above in two respects. First, it is too

allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox*, *supra*, at 242–244; *Kirby*, *supra*, at 55–61. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr*, we disagree with THE CHIEF JUSTICE’s reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The “principle so truly important” on which “inroad[s]” had been introduced was the “rule of evidence which rejects mere hearsay testimony.” See 25 F. Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause’s exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see *supra*, at 22, n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U. S. 149, 162 (1970). It is therefore irrelevant that the reliability of some out-of-court statements “‘cannot be replicated, even if the declarant testifies to the same matters in court.’” *Post*, at 6 (quoting *United States v. Inadi*, 475 U. S. 387, 395 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U. S. 409, 414 (1985).)

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broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, e.g., *Lilly*, 527 U. S., at 140–143 (BREYER, J., concurring); *White*, 502 U. S., at 366 (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, *The Constitution and Criminal Procedure* 125–131 (1997); Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U. S., at 352–353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford’s statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s

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protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.” Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 (“This open examination of witnesses . . . is much more conducive to the clearing up of truth”); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing “beats and bolts out the Truth much better”).

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States*, 98 U. S. 145, 158–159 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh’s repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham’s

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statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.*, at 14, and that they were not “extracted from [him] upon any hopes or promise of Pardon,” *id.*, at 29. It is not plausible that the Framers’ only objection to the trial was that Raleigh’s judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, e.g., *People v. Farrell*, 34 P. 3d 401, 406–407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was “detailed,” *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting,” *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245

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(2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin v. Commonwealth*, 40 Va. App. 327, 335–338, 579 S. E. 2d 367, 371–372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State v. Bintz*, 2002 WI App. 204, ¶13, 257 Wis. 2d 177, 187, 650 N. W. 2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given “immediately after” the events at issue, *Farrell, supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens v. People*, 29 P. 3d 305, 316 (2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality’s speculation in *Lilly*, 527 U. S., at 137, that it was “highly unlikely” that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. See *Photogrammetric Data Servs., supra*, at 245–246; *Farrell, supra*, at 406–408; *Stevens, supra*, at 314–318; *Taylor v. Commonwealth*, 63 S. W. 3d 151, 166–168 (Ky. 2001); *State v. Hawkins*, No. 2001–P–0060, 2002 WL 31895118, ¶¶34–37, *6 (Ohio App., Dec. 31, 2002); *Bintz, supra*, ¶¶7–14, 257 Wis. 2d, at 183–188, 650 N. W. 2d, at 916–918; *People v. Lawrence*, 55 P. 3d 155, 160–161 (Colo. App. 2001); *State v. Jones*, 171 Ore. App. 375, 387–391, 15 P. 3d 616, 623–625 (2000); *State v. Marshall*, 136 Ohio App. 3d 742, 747–748, 737 N. E. 2d 1005, 1009 (2000); *People v. Schutte*, 240 Mich. App. 713, 718–721, 613 N. W. 2d 370, 376–377 (2000); *People v. Thomas*, 313 Ill. App. 3d 998, 1005–1007, 730 N. E. 2d 618, 625–626 (2000); cf. *Nowlin, supra*, at 335–338, 579 S. E. 2d, at 371–

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372 (witness confessed to a related crime); *People v. Campbell*, 309 Ill. App. 3d 423, 431–432, 721 N. E. 2d 1225, 1230 (1999) (same). One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar*, 295 F. 3d 1018, 1021–1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States v. Centracchio*, 265 F. 3d 518, 527–530 (CA7 2001) (same); *United States v. Dolah*, 245 F. 3d 98, 104–105 (CA2 2001) (same); *United States v. Petrillo*, 237 F. 3d 119, 122–123 (CA2 2000) (same); *United States v. Moskowitz*, 215 F. 3d 265, 268–269 (CA2 2000) (same); *United States v. Gallego*, 191 F. 3d 156, 166–168 (CA2 1999) (same); *United States v. Papajohn*, 212 F. 3d 1112, 1118–1120 (CA8 2000) (grand jury testimony); *United States v. Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) (same); *Bintz*, *supra*, ¶¶15–22, 257 Wis. 2d, at 188–191, 650 N. W. 2d, at 918–920 (prior trial testimony); *State v. McNeill*, 140 N. C. App. 450, 457–460, 537 S. E. 2d 518, 523–524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness’s statement was made to police while in custody on pending charges—the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g.*, *Gallego*, *supra*, at 168 (plea allocution); *Papajohn*, *supra*,

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at 1120 (grand jury testimony). That inculpatory statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed]" on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law en-

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forcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant.” *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by “neutral” government officers. But even if the court’s assessment of the officer’s motives was accurate, it says nothing about Sylvia’s perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements—that they were both ambiguous as to when and whether Lee had a weapon. The court’s claim that the two statements were *equally* ambiguous is hard to accept. Petitioner’s statement is ambiguous only in the sense that he had lingering doubts about his recollection: “A. I coulda swore I seen him goin’ for somethin’ before, right before everything happened. . . . [B]ut I’m not positive.” *Id.*, at 155. Sylvia’s statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: “Q. Did Kenny do anything to fight back from this assault?” *Id.*, at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court’s view that Sylvia’s statement was ambiguous—he called it “damning evidence” that “completely refutes [petitioner’s] claim of self-defense.” Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the “interlocking” ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the “reliability factors” under *Roberts*

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and finding that Sylvia Crawford’s statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court’s decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U. S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring v. Arizona*, 536 U. S. 584, 611–612 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh’s—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*’ providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States

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flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.”¹⁰ Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

¹⁰We acknowledge THE CHIEF JUSTICE’s objection, *post*, at 7–8, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. See *supra*, at 27–30, and cases cited. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.

MICHIGAN RULES OF EVIDENCE

Rule 101 Scope

These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court.

Rule 102 Purpose

These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103 Rulings on Evidence

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104 Preliminary Questions

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, and so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105 Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106 Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 201 Judicial Notice of Adjudicative Facts

(a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts, and does not preclude judicial notice of legislative facts.

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* A court may take judicial notice, whether requested or not, and may require a party to supply necessary information.

(d) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(e) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

(f) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 202 Judicial Notice of Law

(a) *When discretionary.* A court may take judicial notice without request by a party of (1) the common law, constitutions, and public statutes in force in every state, territory, and jurisdiction of the United States; (2) private acts and resolutions of the Congress of the United States and of the Legislature of Michigan, and ordinances and regulations of governmental subdivisions or agencies of Michigan; and (3) the laws of foreign countries.

(b) *When conditionally mandatory.* A court shall take judicial notice of each matter specified in paragraph (a) of this rule if a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request.

Rule 301 Presumptions in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302 Presumptions in Criminal Cases

(a) *Scope.* In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) *Instructing the jury.* Whenever the existence of a presumed fact against an accused is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic facts and that the prosecution still bears the burden of proof beyond a reasonable doubt of all the elements of the offense.

Rule 401 Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of

character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;

(2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor;

(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;

(4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.*

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Rule 405 Methods of Proving Character

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 406 Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove

that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407 Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408 Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409 Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
- (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 411 Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

Rule 501 Privilege; General Rule

Privilege is governed by the common law, except as modified by statute or court rule.

Rule 601 Witnesses; General Rule of Competency

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Rule 602 Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603 Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604 Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 605 Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606 Competency of Juror as Witness

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

Rule 607 Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608 Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609 Impeachment by Evidence of Conviction of Crime

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) *Determining probative value and prejudicial effect.* For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(d) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(e) *Juvenile adjudications*. Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.

(f) *Pendency of appeal*. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

GRIFFIN, J., states: Because I disagree with the majority opinion in *People v Allen*, [429 Mich 558 (1988)] I dissent from the adoption of this amendment of MRE 609.

Rule 610 Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 611 Mode and Order of Interrogation and Presentation

(a) *Control by court*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination*. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

(c) *Leading Questions*.

(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

(2) Ordinarily leading questions should be permitted on cross-examination.

(3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

Rule 612 Writing or Object Used to Refresh Memory

(a) *While testifying*. If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before testifying*. If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and conditions of production and use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence, for their bearing on credibility only unless otherwise admissible under these rules for another purpose, those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613 Prior Statements of Witnesses

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 614 Calling and Interrogation of Witnesses by Court

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615 Exclusion of Witnesses

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Rule 701 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 702 Testimony by Experts

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703 Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

Rule 704 Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705 Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706 Court-Appointed Experts

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and

proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Rule 707 Use of Learned Treatises for Impeachment

To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

Rule 801 Hearsay; Definitions

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. (d) *Statements which are not hearsay.* A statement is not hearsay if—

(1) *Prior statement of witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

Rule 802 Hearsay Rule

Hearsay is not admissible except as provided by these rules.

Rule 803 Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements made for purposes of medical treatment or medical diagnosis in connection with treatment.* Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Deposition testimony of an expert.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding.

(19) *Reputation concerning personal or family history.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to character.* Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 803A Hearsay Exception; Child's Statement About Sexual Act

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;

- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

Rule 804 Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) has a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
- (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by

the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Deposition Testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(6) *Statement by declarant made unavailable by opponent.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(7) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

MRE 804 is identical with Rule 804 of the Federal Rules of Evidence except:

(1) MRE 804(a)(3) is identical with Federal Rule 804(a)(3) except that the word "has" is substituted for the phrase "testifies to."

(2) MRE 804(a)(5) is identical with Federal Rule 804(a)(5) except for the addition of the phrase: "and in a criminal case, due diligence is shown."

(3) MRE 804(b)(3) is identical with Federal Rule 804(b)(3) except that the phrase "reasonable person" is substituted for the phrase "reasonable man."

(4) The Michigan Rules of Evidence contain no catch-all hearsay exception such as found in Federal Rule 804(b)(5).

(5) Subrule (b)(5) defines several hearsay exceptions for deposition testimony. The new subrule combines a part of former subrule (b)(1) with parts of former MCR 2.308(A), which has been amended concurrently.

Note to amendment of January 19, 1996:

The 1996 adoption of MRE 804(b)(6) incorporated into the Michigan Rules of Evidence the residual or "catch-all" exceptions to the hearsay rule that are part of the Federal Rules of Evidence.

Note to amendment of May 21, 2001:

MRE 804(b)(6) was added and is almost identical to FRE 804(b)(6), which was added to the federal rules effective December 1, 1997. The new subrule creates a hearsay exception for prior statements by a witness who has become unavailable due to wrongful acts committed or encouraged by the party against whom the statement is to be introduced.

Rule 805 Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806 Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 901 Requirement of Authentication or Identification

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be.
- (2) *Nonexpert opinion on handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) *Comparison by trier or expert witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
- (4) *Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
- (9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- (10) *Methods provided by statute or rule*. Any method of authentication or identification provided by the Supreme Court of Michigan or by a Michigan statute.

Rule 902 Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) *Domestic public documents under seal*. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific

Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions created by law.* Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

(11) *Certified records of regularly conducted activity.* The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would

be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that

(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) The record was kept in the course of the regularly conducted business activity; and

(C) It was the regular practice of the business activity to make the record.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903 Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Rule 1001 Contents of Writings, Recordings, and Photographs; Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

2) *Photographs*. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) *Original*. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original.

Rule 1002 Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Rule 1003 Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004 Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

- (1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or
- (3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (4) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005 Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006 Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007 Testimony or Written Admission of a Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Rule 1008 Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Rule 1101 Applicability

- (a) *Rules applicable.* Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state.
- (b) *Rules inapplicable.* The rules other than those with respect to privileges do not apply in the following situations and proceedings:
- (1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
 - (2) *Grand jury.* Proceedings before grand juries.
 - (3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
 - (4) *Contempt proceedings.* Contempt proceedings in which the court may act summarily.
 - (5) *Small claims.* Small claims division of the district court.
 - (6) *In camera custody hearings.* In camera proceedings in child custody matters to determine a child's custodial preference.
 - (7) *Proceedings involving juveniles.* Proceedings in the family division of the circuit court wherever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply.
 - (8) *Preliminary examinations.* At preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry.
 - (9) *Domestic Relations Matters.* The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(1)(g) or (h).
 - (10) *Mental Health Hearings.* In hearings under Chapters 4, 4A, 5, and 6 of the Mental Health Code, MCL 330.1400 *et seq.*, the court may consider hearsay data that are part of the basis for the opinion presented by a testifying mental health expert.

Rule 1102 Title

These rules are named the Michigan Rules of Evidence and may be cited as MRE.

The notes following the individual rules were drafted by the chair and the reporter of the committee which drafted the proposed rules of evidence for the benefit of the bench and bar and are not authoritative constructions by the Court.